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SUBANG JAYA MEDICAL CENTRE SDN BHD

v.

MENTERI SUMBER MANUSIA & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[JUDICIAL REVIEW NO: R1-25-30-2007]
19 DECEMBER 2011

C

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash Minister's reference to Industrial Court for reinstatement - Whether Minister erred in law or exceeded his jurisdiction under the Industrial Relations Act 1967 in making reference*

D

CONTRACT: *Employment contract - Wrongful termination - Workman or contractor for service - Whether entitled to make representation under s. 20 Industrial Relations Act 1967 for dismissal without just cause or excuse - Whether complainant a workman - Whether Minister erred in making reference to Industrial Court for reinstatement*

E

LABOUR LAW: *Employment - Dismissal - Workman or contractor for service - Whether complainant entitled to make representation under s. 20 Industrial Relations Act 1967 for dismissal without just cause or excuse - Whether complainant a workman - Whether Minister erred in making reference to Industrial Court for reinstatement*

F

LABOUR LAW: *Industrial Court - Jurisdiction - Termination of employment - Whether court had jurisdiction - Whether complainant a workman - Whether Minister erred in making reference to Industrial Court for reinstatement*

G

The Minister of Human Resources ('1st respondent') had referred a representation for reinstatement to the Industrial Court for adjudication. Subang Jaya Medical Centre Sdn Bhd ('the applicant') had sought leave for an order of *certiorari* to quash the Minister's reference. The applicant contended that the Minister erred in law or had exceeded his jurisdiction on the grounds that the complainant whose representation was referred to the Industrial Court was not a workman and as such, the Minister

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had exceeded his jurisdiction under the Industrial Relations Act 1967 ('the IRA') in making the reference. The applicant also contended that there was no contract of employment and in referring to the complainant's representation for reinstatement, the Minister had in essence conferred upon the complainant the status of a workman.

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According to the applicant, the complainant was incapable of being reinstated as he was not a workman. The Minister contended that there were serious and fundamental dispute of facts as to whether there was

an employer-employee relationship and as such the proper forum to decide questions of fact and law arising from a representation under s. 20 IRA was the Industrial Court.

Held (dismissing applicant's application):

(1) The determination of whether one is a workman under the IRA is a question of mixed law and fact. This exercise involves an assessment of the facts concerning the conduct of the parties and formulation of opinion. The question whether one is a workman or otherwise is not collateral to the merits of the case but forms part of the main or central question which the Industrial Court is tasked to determine; *Dr A Dutt v. Assunta Hospital* (refd). (paras 18 & 19)

(2) The High Court as a reviewing court which exercises supervisory function is not to decide on dispute of facts and/or to go on a fact finding exercise and the court would be usurping and acting *ultra vires* the IRA if it were to decide this question without first allowing the Industrial Court which was specially created to hear the issue and has the jurisdiction through the reference (to hear and decide on the issue); *Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor* (refd). (para 22)

(3) To determine whether there had been a proper exercise by the Minister of his discretion under s. 20(3) of the IRA, the court adopted the approach as propounded in *Exxon Chemical (M) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors*. The duty of the reviewing court is to conduct an objective examination of the facts placed before the Minister at the material time to ascertain whether a reasonable person, similarly circumstanced would have arrived at the same decision as the Minister had acted based on the facts; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* (refd). (para 35)

(4) The Minister had not erred in law or exceeded his jurisdiction on any of the grounds as contended by the applicant when exercising his discretion under s. 20(3) of the IRA to refer the representation for adjudication by the Industrial Court. (para 43)

Case(s) referred to:

Assunta Hospital v. Dr A Dutt [1979] 1 LNS 6 HC ***(refd)***

Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121 FC ***(refd)***

Chan Hock Liong v. Associated Motor Industries (M) Sdn Bhd [2007] 5 CLJ 298 CA ***(refd)***

Chong Kim Sang v. Metatrade Sdn Bhd [2004] 2 CLJ 439 CA ***(refd)***

Dato' Tan Kim Hor v. Tan Chong Motor Holdings Berhad (Rayuan Sivil No. W-04-86-2004) (Unreported) ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Eshugbayi Eleko v. Government of Nigeria [1931] AC 662 ***(dist)***
EU Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2007] 2 CLJ 97 FC ***(foll)***
Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2004] 1 CLJ 451 CA ***(foll)***
General Electric Co Ltd v. Price Commission [1975] ICR 1 ***(refd)***
Great Eastern Mills Bhd v. Ng Yuen Ching & Ors [1998] 3 CLJ 847 HC ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(foll)***
Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***
Kilang Gula Felda Perlis Sdn Bhd v. Aman Shah Abdul Khalid [1997] 1 LNS 146 HC ***(refd)***
Liversidge v. Sir John Anderson [1942] AC 206 ***(dist)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Massey v. Crown Life Insurance Co [1978] ICR 590 ***(refd)***
Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal [2007] 1 CLJ 366 CA ***(refd)***
Mervin Phelan v. BIC (Ireland) Ltd, Biro BIC Ltd, Societe BIC SA and Robert McDonald [1997] ELR 208 ***(foll)***
Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
Minister of Labour, Malaysia v. National Union of Journalists Malaysia [1991] 1 CLJ 31; [1991] 1 CLJ (Rep) 300 SC ***(refd)***
Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Rajan Chellaiah v. Menteri Sumber Manusia Malaysia & Anor [2000] 3 CLJ 171 HC ***(refd)***
Regina v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] 1 QB 227 ***(refd)***
Salvesen v. Simons [1994] ICR 409 ***(refd)***
Tanjong Jaga Sdn Bhd v. The Minister of Labour And Manpower & Anor [1987] 2 CLJ 119; [1987] CLJ (Rep) 368 SC ***(refd)***
United Asian Bank Berhad v. Elgi Marka Sdn Bhd [1995] 1 CLJ 407 HC ***(refd)***
V Subramaniam & Ors v. Craigielea Estate [1982] 1 LNS 40 FC ***(foll)***
Wilkinson v. Lugg [1990] ICR 599 ***(refd)***
YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24
Industrial Relations Act 1967, ss. 2, 9(5), 20(1), (2), (3), 26
Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 53 r. 3(2)

Other source(s) referred to:
Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action*, 3rd edn, p 228
Michael Fordham, *Judicial Review Handbook*, 4th edn, p 849
Norchaya Talib, *Torts in Malaysia*, pp 759-760
Wade & Forsyth's Administrative Law, 9th edn, p 252

For the applicant - S Rutheran (Lim Heng Seng with him); M/s R Sivagnanam & Assocs
For the 1st respondent - Sharifah Hascindie Syed Omar; SFC
For the 3rd respondent - TJ Su (EL Teh & Abdullah Khubayb with him); M/s Cheah Teh & Su

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

Background

[1] This is an appeal of the appellant/applicant, Subang Jaya Medical Centre Sdn Bhd ("the appellant") against the decision of this court made on 21 December 2009 (i) dismissing the applicant's application for an order of *certiorari* to quash the decision of the Industrial Court that allowed the reference of the 1st respondent, the Honourable Minister of Human Resources ("the Minister/the 1st respondent") for reinstatement of the 3rd respondent, Dr. David Vanniasingham Ramanathan, with costs to be taxed unless otherwise agreed and; (ii) the further order wherein the court ordered that there be an assessment of damages from 2 October 2007 and upon assessment by the registrar to be paid by the applicant to the 3rd respondent as per the applicant's undertaking as to damages on 2 October 2007 when the court allowed the applicant's application that the reference dated 29 December 2006 made by the Minister and all steps, proceedings and/or further application to enforce the said reference before the Industrial Court of Malaysia be stayed until the substantive application for judicial review is heard and finally determined.

[2] The brief facts of the application is as follows. *Vide* a letter dated 29 December 2006 which was received by the applicant on 15 January 2007, the Minister referred the representation of the applicant for reinstatement to the Industrial Court for adjudication. Not satisfied with the said decision of the Minister, the applicant applied *vide* encl.1 for leave to seek orders of *certiorari* to quash the Minister's reference and

A the consequential orders of prohibition and stay of the reference pending the hearing and disposal of the substantive application. Leave for the orders sought save for stay was heard and granted by His Lordship, the late Datuk KP Gengadharan Nair (as he then was) on 2 March 2007; whilst stay was ordered to be heard *inter partes*.

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[3] On the 30 January 2008 the court had allowed the summons in chambers' application dated 27 September 2009 (encl. 55) of the 4th to the 10th respondents to intervene in the judicial review application with costs be in the cause.

C **[4]** On 21 December 2009, the court had allowed the summons in chambers' application dated 20 November 2009 (encl. 150) of the 3rd respondent that the order of the court dated 30 January 2008 allowing the 4th to the 10th respondents to intervene pursuant to O. 15 r. 6(2)(b) of the Rules of the High Court 1980 ("the RHC") (i) to be D revoked and/or cancelled and/or withdrawn; (ii) that there be no order as to costs; and (iii) that the materials and submission put in by the 4th to the 10th will not be taken into account by this court without prejudice to the integrity of the applications in encls. 123 to 130. Thus for purposes of this appeal I shall be merely considering the E submissions of the applicant, the 1st respondent and the 3rd respondent (see para. 6 below).

On 21 December 2009, in respect of the hearing of the substantive application for judicial review on the merits, the court made the order referred to in para. 1 above and to reiterate it is against this order of F the court that the applicant has appealed.

[5] For completeness, on 8 January 2010, as there is confirmation that there will be no appeal by the 4th to the 10th respondents against the court's order made on 21 December 2009 with respect to encl. 150 (see para. 4 above), the 4th to 10th respondents sought leave of the G court to set aside the leave (encl. 116) granted to the 3rd respondent on 8 July 2009 to apply for an order of committal that the contempt proceedings in encls. 123 to 130 be instituted against the 4th to the 10th respondents/4th to 10th contemnors.

H On 8 January 2010 the court ordered that the order of the court dated 8 July 2009 be set aside and the contempt proceedings in encls. 123 to 130 be dismissed without determination on the merits and there be no order as to costs.

I **[6]** The court has considered the revised submission of the applicant, the applicant's submission in reply and the applicant's reply to the 3rd respondent's reply to the applicant's submission in reply (encls. 86, 102

and 113A respectively), the 1st respondent's Skeletal Submission (encl. 90), the 3rd respondent's written submission and the 3rd respondent's written submission in reply (encls. 99 and 110 respectively) and the authorities cited in support thereof. The reasons for the decision are as follows.

Contentions Of The Parties

[7] Based on the statement made pursuant to O. 53 r. 3(2) RHC (encl. 2), summarily, the applicant contends the Minister has erred in law/has exceeded his jurisdiction on the following grounds:

(i) has failed to appreciate that the Industrial Relations Act 1967 ("the IRA") only accorded him the threshold jurisdiction to refer a representation for reinstatement by a workman to the Industrial Court (2nd respondent) and that in the present instance, this pre-requisite was absent and hence by acting as he did he has exceeded his jurisdiction;

(ii) has failed to take into consideration the fact that the parties had deliberately established a relationship that was not one of employer and workman;

(iii) has failed to take into consideration and to give adequate weightage to material and relevant factors of and concerning the performance of the agreement active status which was consistent with the fact that the parties had not established nor had they intended to establish a contract of employment;

(iv) has failed to take into consideration the fact that in referring the 3rd respondents' representation for reinstatement, he had in essence conferred upon him the status of a workman even though the 3rd respondent had never complied with the statutory obligations of a workman;

(iv) has failed to take into consideration the fact that the 3rd respondent's contract was incapable of being reinstated as a contract of employment as the same would give rise to illegality and/or impossibility as the contract inherently provided for the right of renewal or non-renewal;

(vi) has failed to take into consideration the fact the three respondents' representation was an abuse of the statutory process and in excess of the provisions of s. 20 IRA in that he was not seeking to reinstate an employment contract but rather to re-write and to create one, which did not previously exist.

[8] Basically the 1st respondent's contentions which can be gleaned from the 1st respondent's affidavit in reply affirmed by the Minister on 17 September 2007 ("the 1st respondent's affidavit") are:

(a) there are serious and fundamental dispute of facts that arise from the 3rd respondent's representation which, *inter alia*, include whether the 3rd respondent was subject to some degree of control by the applicant and whether the relationship between the 3rd respondent and the applicant is an employer-employee relationship. The proper forum to decide on mixed questions of fact and law arising from a representation under s. 20 IRA is the Industrial Court and not the Minister;

(b) the Minister is not under a duty to decide on the threshold jurisdiction of workman;

(c) the mere fact that the Minister refers the matter to the Industrial Court does not mean the Minister has already made a decision that the 3rd respondent is a workman under the IRA; and

(d) the Minister has considered all the relevant factors and it cannot be said that the decision of the Minister to refer the 3rd respondent's representation to the Industrial Court is so unreasonable in the "Wednesbury sense".

[9] Broadly, the 3rd respondent's contentions which the 1st respondent also adopted are:

(i) the 1st respondent has not determined the status of the 3rd respondent;

(ii) under s. 20 of the IRA, the Industrial Court is the forum to decide the 3rd respondent's status;

(iii) this court as the reviewing court exercising its supervisory jurisdiction is not to decide on disputes of facts and become a fact finding tribunal;

(iv) the term "workman" in s. 20(1) of the IRA is not a jurisdictional fact or precedent fact or condition precedent which the 1st respondent has to determine first before exercising the discretion to refer a representation to the Industrial Court;

(v) the 3rd respondent's relationship with the applicant has the hallmarks of an employment and it is for the Industrial Court to determine;

(vi) the 1st respondent's reasons to refer the representation to the Industrial Court is justified; and

(vii) there is no illegality, contrary to the applicant's allegation. In any event, (a) the Industrial Court is the forum to decide the issue of illegality and the Industrial Court's jurisdiction is not ousted by a mere claim of illegality; (b) even if there is an illegality, the 3rd respondent's claim is not necessarily defeated.

Findings Of The Court

[10] Basically the applicant premised its arguments on three major areas:

(a) Whether the Minister asked himself the correct question?

(b) Whether the Minister had discharged his functions in relation to the "workman" issue, proceeding upon the basis that it is a threshold issue ("1st proposition");

(c) Irrespective of the threshold status of the "workman" issue, whether the Minister had failed to consider relevant matters ("2nd proposition").

Did The Minister Ask Himself The Correct Question?

[11] With respect to this point, the applicant referred to the following averments in paras. 12 and 16 respectively of the Minister's 1st affidavit:

(i) Sekiranya doktor tersebut bukan seorang "workman" maka kes beliau bukan di bawah skop Akta 177. Oleh itu, hanya Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar dan memutuskan hal ini.

(ii) Sehubungan itu, saya telah menggunakan budi bicara dan mengambil tindakan yang munasabah bagi merujuk kes ini ke Mahkamah Perusahaan yang merupakan forum yang mempunyai bidangkuasa untuk menentukan status sebenar Doktor.

In this regard the applicant submitted that:

(i) the Minister failed to apprehend his role as a filter to ensure the fitness of the representation;

(ii) the Minister failed to appreciate that there were jurisdictional issues which negated the fitness of the representation;

(iii) the Minister failed to appreciate the significance of the threshold issue. He seemed to proceed as if any dispute over the workman status merited determination by the Industrial Court.

With respect, I am of the considered view that the applicant's contention is without merit for reasons which will become apparent when I address the arguments with respect to the 1st and 2nd propositions posed by the applicant.

A **Applicant's 1st Proposition**

[12] The applicant's 1st proposition is the status of workman is a jurisdictional fact or precedent fact or conditional precedent which must first be established in order to trigger the statutory power of the Minister to exercise his discretion under s. 20(3) IRA to refer the representation for reinstatement to the Industrial Court.

B

The applicant submitted that "unless the person making the representation is a workman, neither the DGIR nor the Minister has the power to handle his representation." for the following reasons:

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(a) based on the opening words of s. 20(1) IRA which reads:

> **Where a workman**, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated ... (emphasis added);

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(b) there is no requirement of actual proof of dismissal without just cause and excuse as it is not a precedent fact as confirmed by the permissive term "considers himself dismissed without just cause and excuse". However the term "where a workman" is not qualified in any manner like "where a person considers himself a workman";

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(c) the averment (i) in para. 11 above is a threshold issue which dictates the Minister to enter into an enquiry in question. If the basic threshold jurisdiction is not there the "representation" is no representation citing *United Asian Bank Berhad v. Elgi Marka Sdn Bhd* [1995] 1 CLJ 407 which applied the decision in *EU Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 at p. 39H;

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(d) "there is no provision which allows the Minister to make a reference to the Industrial Court to ascertain whether a precedent fact which is necessary to establish the Minister's own jurisdiction exists or not";

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(e) in order to make sense of the election in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 2 MLJ 685 (SC) at p. 693 F-H as to whether to challenge the Minister's reference on the ground of threshold jurisdiction or to ventilate the matter after full trial in the Industrial Court, it is inherent that the 1st respondent must have a decision making role to determine whether the precedent facts to enable him to exercise his jurisdiction

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even exists. The Minister cannot just accept and refer a representation by a person who has never been treated as a workman by his own course of dealings for over 20 years, regardless of whether there is any rationally probative basis for the contention that it is "fit" for reference; and

(f) being mindful of the opinions of *Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal* [2007] 1 CLJ 366 (CA) and *Dato' Tan Kim Hor v. Tan Chong Motor Holdings Berhad* (Rayuan Sivil No. W-04-86-2004) (unreported case). In the latter case the very issue before this court is pending before the Federal Court:

> Berkenaan bidang kuasa melintang iaitu persoalan Responden adalah seorang "pekerja" di bawah Seksyen 20 Akta tersebut haruslah dibuat oleh Menteri apabila ia melibatkan percampuran soalan yang berciri fakta dan undang-undang atau adakah Menteri berkewajipan untuk merujukkan soalan berkenaan untuk ditentukan oleh Mahkamah Perusahaan sebagaimana yang Mahkamah Rayuan nampaknya telah putuskan.

[13] As correctly submitted by the 3rd respondent and which has been largely adopted by the 1st respondent, I find the applicant's 1st proposition is misconceived. I shall address the reasons below.

[14] The phrase "Where a workman" in s. 20(1) IRA is not a jurisdictional fact because it is not objectively framed and the answer to the question of whether one is a workman or otherwise is not capable of objective existence (see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, 3rd edn, p. 228) and this question is not collateral to the merits of the case (see *Wade & Forsyth's Administrative Law*, 9th edn, p. 252).

[15] The term "workman" is of wide purport incapable of an "objective existence" answer (see *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304 at pp. 310I-311A) and Parliament intended to keep the definition of the term "workman" flexible, with a view of being worked out on a case by case basis (see *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369 (FC) at p. 388C-F. Therefore the term "workman" is subject to the satisfaction or opinion of a decision maker premised upon the facts of a case which could include an oral contract of employment or implying a contract of employment when s. 20(1) is read with the definition of "workman" in s. 2 IRA which involves the weighing of two opposing set of facts and the formulation of an opinion.

[16] The Minister has carried out an assessment of the two opposing facts and came to an opinion stating "saya berpuas hati bahawa representasi Doktor wajar di rujuk ke Mahkamah Perusahaan di bawah sub-s. 20 (3)(IRA)" after he "mengkaji dan meneliti secara mendalam semua maklumat mengenai representasi".

[17] Following *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 at p. 670 when the Minister exercises his discretion:

> The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case ....

[18] The determination of whether one is a workman under the IRA is a question of mixed law and fact. This exercise involves an assessment of the facts concerning the conduct of the parties and formulation of opinion as can be drawn from the judgment of *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304 at p. 3101 right - p. 311A left wherein the Federal Court stated:

> The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service.

[19] The question whether one is a workman or otherwise is not collateral to the merits of the case but forms part of the main or central question which the Industrial Court is tasked to determine as the following high authorities show, to name but a few:

(a) *Assunta Hospital v. Dr A Dutt* [1979] 1 LNS 6; [1980] 1 MLJ 96 at p. 97 A-B right:

> The question of **whether Dr Dutt is a "workman" is a question of fact for the Industrial Court to decide**. The relationship between employer/employee or master/servant is pure question of fact. (see *DC Works Ltd v. State of Saurashtra*). Whether or not there is a contract of service or for service and between whom is a pure question of fact. (see *Employees Provident Fund Board v. Bata Shoe Co. (M) Ltd.*) (emphasis added);

(b) *Dr A Dutt* (*supra*) (FC) at p. 116E left and A-B right:

> The question whether Dr Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse ... the (Industrial) court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse.;

(c) *John Hancock* (*supra*) at p. 384 and p. 390:

> ... the issue of whether the claimant is a workman is solely for the Industrial Court to decide and that the learned judge was wrong in issuing *certiorari* to quash the decision of the Minister and in issuing the order of prohibition. We would agree with the submission of learned counsel for the claimant that the law is clear, namely, that where there are mixed questions of law or fact arising from representations under s. 20 of the Act, the proper forum to decide on such issues would be the Industrial Court and not the Minister. (para. 24);
>
> We would agree with learned counsel for the claimant that where there is an issue of workman involved, the only legal forum to deal with this issue is the Industrial Court. ... There are serious and fundamental disputes of fact and questions of law that arise from the claimant's representations and these are matters which have to be dealt with by the Industrial Court. ...
>
> We are of the view that the learned judge erred in law in holding that the claimant was not a workman as that would be tantamount to usurping the power of the Industrial Court. (paras. 35 and 36);

(d) *Hoh Kiang Ngan* (*supra*) at p. 388G-H; and

(e) *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439; [2004] 3 MLJ 1 (CA) (para. 35).

[20] In *Kathiravelu Ganesan* (*supra*) at pp. 694-695, His Lordship Gopal Sri Ram JCA (as he then was) had referred to the four different levels in the context of s. 20 IRA, (i) the conciliatory level (s. 20(1)), (ii) the reporting level (s. 20(2)), (iii) the referral level (s. 20(3)) where all that is required to call for the exercise of power by the Minister is the existence of a notification and in exercising his discretion, he considers the merits of the representation, ie, the fitness test but does not adjudicate the same, and (iv) the adjudicatory level is where the Industrial Court is seised with jurisdiction to determine the dispute.

At the referral level the Minister must adhere to the 'Hashim Yeop test' namely, to consider whether having regard to the facts and circumstances of the given case, the representation made by the workman is frivolous or vexatious (per Gopal Sri Ram JCA at p. 694 G-I). In *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 at p. 119 Hashim Yeop A Sani CJ (Malaya) (as he then was) said:

> The minister's discretion under s. 20(3) is wide but not unlimited ... [S]o long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

[21] The applicant further submitted that the question of jurisdictional fact can and must be investigated by the court which is "authorised to decide on this live issue" citing para. 49.1.1, p. 849 of Michael Fordham's *Judicial Review Handbook*, 4th edn. where the cases of *Eshugbayi Eleko v. Government of Nigeria* [1931] AC 662 (Privy Council) and *Liversidge v. Sir John Anderson* [1942] AC 206 (HL) were cited.

[22] In this regard, I agreed with the 3rd and 1st respondents that the applicant's submission is misconceived for the following reasons. Firstly, this court as a reviewing court which exercises supervisory function is not to decide on dispute of facts and/or to go on a fact finding exercise and the court would be usurping and acting ultra vires the IRA if it were to decide this question without first allowing the Industrial Court which was specially created to hear the issue and has the jurisdiction through the reference (see *Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 2 MLJ 199 at p. 202H-I where on the supervisory nature of the jurisdiction, the Federal Court quoted Lord Denning MR, in *General Electric Co Ltd v. Price Commission* [1975] ICR 1, (at p. 12); *Tanjong Jaga Sdn Bhd v. The Minister of Labour And Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368 which approved the English Court of Appeal cases in *Regina v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227 at p. 129C-F; and *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2007] 2 CLJ 97; [2007] 3 MLJ 1 at p. 5 (para. D) and p. 7 (para. 8) where the Federal Court answered in the affirmative the question posed of whether the Minister is obliged to refer representations to the Industrial Court under s. 20(3) IRA if he feels that there is a serious issue of fact and law to be determined.

[23] Secondly, the cases of *Eshugbayi Eleko* (*supra*) and *Liversidge* (*supra*) can be distinguished in that:

(a) they are concerned with statutory schemes where there is only one decision maker, ie, the Governor of Nigeria in the former case and the Secretary of State in the latter case unlike in the instant case where the Industrial Court, a quasi-judicial body has an adjudicatory role under s. 20(3) IRA (referred to in para. 13.7 above) with respect to representations referred to it as in this instance, whether the 3rd respondent is a workman;

(b) in this instance, the Minister has not decided on whether the 3rd respondent is a workman unlike the cases of *Eshugbayi Eleko* (*supra*) and *Liversidge* (*supra*) where an order of deportation and an order of detention were respectively made.

Applicant's 2nd Proposition

[24] With respect to the 2nd proposition, the salient points submitted on by the applicant are as follows. Firstly, if the court is minded to be guided by the decisions of *John Hancock* (*supra*) and *Dato' Tan Kim Hor* (*supra*), they do not state that the Minister may refer any and every case where the workman issue is in dispute to the Industrial Court.

[25] Secondly, when the *John Hancock*'s case (*supra*) is read as a whole one can conclude while the Minister is not under a duty to decide whether a person is a workman or not and that he may leave such an issue to the Industrial Court, the Minister must address his mind to all the relevant matters to determine if it is a fit case for reference and there must be some basis to treat the person as a workman (p. 385 para. 28H-I to p. 386A-C).

[26] Thirdly, broadly the relevant matters which the Minister failed to consider are:

(i) the agreement bore clear hallmarks of a non-employment relationship for example the said Doctor is required to pay rental for the use of clinic facilities, the said Doctor does not receive a salary but instead is paid professional fees, the said Doctor is not entitled to paid leave, the said Doctor's terms and conditions are not administered by the Human Resource Department of the Applicant, the said Doctor is free to assign his patient as he pleases, the said Doctor is not subject to annual appraisals not is he entitled to receive increments and bonuses (See: pages 50-52 of Exhibit SJMC-5) (Applicant's Submission to the DGIR);

(ii) none of the statutory obligations of and concerning an employment contract was observed by either the said Doctor or the Applicant for example the deductions for the EPF and scheduler deductions for income tax (See: page 51 of Exhibit SJMC-5);

A (iii) it follows from the above that the said agreement cannot be lawfully reinstated and performed as an employment, because Clause 13 and 7 (independent contractor clause) is part and parcel of the very agreement which the said Doctor wants to reinstate. It is a contradiction in terms to his assertion of being a workman. Reinstatement entails the restoration of a contract not
B the creation of a new contract. Here if the said Agreement is reinstated then Clause 13 clearly negates the jurisdiction of Industrial Court and the Minister himself.

To support its proposition that the Industrial Court can only reinstate
C what is *ante* the dismissal and that it cannot create something new, the applicant cited (i) *Chan Hock Liong v. Associated Motor Industries (M) Sdn Bhd* [2007] 5 CLJ 298; [2007] 6 MLJ 323 (CA) at p. 329 paras. 22-24; and (ii) *V Subramaniam & Ors v. Craigielea Estate* [1982] 1 LNS 40; [1982] 1 MLJ 319 (SC) at p. 319G, H-I.

D **[27]** Based on the 1st respondent's 1st affidavit in reply:

(i) Sekiranya doctor tersebut bukan seorang "workman" maka kes beliau bukan di bawah skop Akta 177. Oleh itu, hanya Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar dan memutuskan hal ini;
E

(ii) Kewujudan unsur-unsur kawalan ini menimbulkan keraguan kepada dakwaan Pemohon yang status Doktor tersebut ialah seorang "independent contractor";

(iii) Saya telah dinasihatkan oleh Peguam Kanan Persekutuan dan
F sesungguhnya mempercayai bahawa terdapat keputusan Mahkamah yang mengikat di mana, persoalan sama ada seseorang itu adalah pekerja (workman) adalah campuran persoalan fakta dan undang-undang dan berada di bawah bidangkuasa Mahkamah Perusahaan untuk membuat keputusan dan bukan saya;
G

iv. Sehubungan itu, saya telah menggunakan budi bicara dan mengambil tindakan yang munasabah bagi merujuk kes ini ke Mahkamah Perusahaan yang merupakan forum yang mempunyai bidangkuasa untuk menentukan status sebenar Doktor; and

H Untuk membuat keputusan terhadap fakta-fakta di perenggan 3 Pernyataan Pemohon tanpa melalui proses perbicaraan, adalah di luar keupayaan dan kemampuan fungsi pentadbiran saya dan ia tidak memadai dengan hanya merujuk maklumat kepada saya untuk menyelesaikan pertikaian perusahaan ini.

I the Minister (i) did not give due consideration to these matters; (ii) did not give adequate weightage to them; (iii) only considered the assertions of control by the 3rd respondent.

[28] The existence of control elements should not alter the character of a settled relationship of over 20 years in view of the inconclusivity of the control test as held in *Hoh Kiang Ngan* (*supra*) at p. 391 H-I to p. 392A and in "*Torts in Malaysia*" by Norchaya Talib pp. 759-760.

[29] The assertion by the 3rd respondent that his contract was an employment contract and the decision by the 1st respondent to refer the same to the Industrial Court to facilitate a representation for reinstatement enables the 3rd respondent to defeat the relevant statutory provisions that would otherwise had imposed monthly encumbrances and obligations upon him over the past 20 years. The applicant cited s. 24 Contracts Act 1950, *Massey v. Crown Life Insurance Co* [1978] ICR 590 at p. 594E-G, *Salvesen v. Simons* [1994] ICR 409 at p. 424H to p. 425C-D.

[30] The decision of the Minister to refer the representation to the Industrial Court and the contents of the 1st respondent's affidavits demonstrate failure by him to give actual consideration and weightage to the legal objections canvassed by the applicant as referred to in para. 15.2 above. The cases of *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471 (FC); [1999] 2 MLJ 337 at p. 365 A-F (where the discretion is subject to the words "expedient so to do" under s. 26 IRA), *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 CLJ 31; [1991] 1 CLJ (Rep) 300; [1991] 1 MLJ 24 (SC) at p. 30 left to A-C right (which deal with discretion that is subject to the words "where the Minister decides" under s. 9(5) IRA) and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 (SC) at p. 50 and *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (SC) at p. 14.6 E-F (right) through p. 148B (left) to A (right) (cases which deal with discretion that is subject to the words "think fit" under the Town and Country Planning Act 1976 in the former case and by the Land Executive Committee in the Federal Territory, the equivalent of the "State Commissioner" under the National Land Code in the latter case).

[31] That the decision of the Minister fails the test of reasonableness in the Wednesbury sense in that:

(a) no reasonable person whereby:

(i) facts concerning the mutual acceptance by the parties over a course of dealings of over 20 years of the status of an agreement;

(ii) facts which clearly show that the present assertion that the relationship is actually one of employment, renders the past performance to be illegal and contrary to law;

A (iii) facts which show that the parties themselves structured this agreement after extensive consultation with the Medical Executive Committee, the Applicant along with the input from the Medical Staff members of the hospital;

(iv) facts which show clear hallmarks of a non-employment B relationship such as the requirement to pay rental for the use of clinic facilities, the non-payment of a monthly but is instead paid professional fees, the non-deduction of EPF contributions and scheduler deductions for income tax.

would refer the matter to the Industrial Court on the pretext that:

C (i) the Industrial Court has the jurisdiction to decide on the status of a workman where there is a dispute; and

(ii) the Industrial Court is the best forum to decide upon a dispute involving the status of a workman.

D (b) the Minister's affidavit does not show any appreciation

(i) that the effect of the referral to the Industrial Court throw open and into doubt the settled basis upon which the 3rd respondent governed their relations for over 20 years;

E (ii) for the issue of illegality;

(ii) for the fact that the representation for reinstatement is perverse and untenable as it would amount to seeking to reinstate for an indeterminate period an agreement which is expressed to be a F contract for services.

[32] Again as correctly submitted by the 3rd and 1st respondents, it is my considered opinion that there is no merit in the applicant's submission for the following reasons. I am mindful of the applicant's G submission in the cases of *Assunta Hospital v. Dr A Dutt* [1980] 1 LNS 121 (FC), *John Hancock* (*supra*), *Rajan Chellaiah v. Menteri Sumber Manusia Malaysia & Anor* [2000] 3 CLJ 171, *Kilang Gula Felda Perlis Sdn Bhd v. Aman Shah Abdul Khalid* [1997] 1 LNS 146 and *Great Eastern Mills Bhd v. Ng Yuen Ching & Ors* [1998] 3 CLJ 847 whereby the court was not called upon to examine whether the Minister had H directed himself properly in arriving at the determination that it was a fit case and cannot be used as a reference point to examine the decision making process of the Minister where the latter issue is examined *vide* the 3rd question framed by the Federal Court in the high authority of *Exxon Chemical* (*supra*) when the matter of the 2nd, 3rd and 4th I respondents' complaints of dismissal without just cause and excuse could not be settled by the Director-General of Industrial Relations was referred to the Minister who referred the representation to the Industrial Court under s. 20(3) IRA. I will advert to it in detail later.

[33] In *Exxon Chemical* (*supra*) the Federal Court examined issues on the scope of s. 20(3) of the IRA, where upon leave to appeal being granted to the appellant (*Exxon Chemical*), the 2nd question reframed by the Federal Court being "(ii) Is the High Court correct in stating that the Minister is obliged to refer the matter to the Industrial Court under s. 20(3) of the (IRA) so long as he feels that there is a serious issue of fact and law which requires to be determined?". At pp. 7-8 para. 8, the Federal Court answered the question in the affirmative and stated:

> The word 'feels' is subject to elucidation. If it means a finding or conclusion arrived at by the Minister on the basis of the available facts and documents before him, then so long as he has conducted an objective examination of those facts and documents in accordance with the legal principles discussed earlier, the Minister is under a duty to refer the representations to the Industrial Court for resolution. It has to be noted that the representations must necessarily relate to the allegations made by the employees that they had been dismissed without just cause or excuse. This is implicit in s. 20 of the Act. Furthermore, the serious issue of fact and law must have relevance to the resolution of the dispute between the employer and the employees arising from the representations.

[34] In addressing the 3rd question, "(iii) If the answer to (ii) above is in the affirmative, has the Minister exercised his discretion correctly in the instant case?", the Federal Court opined at pp. 8 and 10 in paras. 10, 14, 15, and 16 (the material parts) and answered the question in the affirmative and stated as follows:

> [10] *It seems clear that the central issue involves the question of whether the representations had raised a serious issue concerning the relationship between the appellant and the Esso companies in Malaysia which necessitated reference to the Industrial Court by the Minister. …*
>
> [14] *… That would not be an inconceivable supposition. As such, oral and/or documentary evidence would need to be led to establish this. It was in this context that the High Court held that the relationship factor raised a triable issue which ought to be ventilated and resolved in the Industrial Court.*
>
> [15] *… There may be a need to ascertain the extent and scope of this document in order to clarify the actual relationship between the parties concerned. Again, oral evidence would be required.*
>
> [16] … True, there was documentary evidence to show that the appellant made attempts to redeploy the said respondents but failed. The respondents appeared to have disputed this or at least the extent of the attempts involved. As such, *both oral and documentary evidence would have to be led. It would therefore be in this context that the Minister had thought it fit to refer the representations to the Industrial Court. We are inclined to agree with him. We hold that the Minister had acted reasonably and correctly in doing so.* (emphasis added).

[35] To determine whether there has been a proper exercise by the Minister of his discretion under s. 20(3) IRA and in this instant case of his decision to refer the matter to the Industrial Court, I would adopt the approach as propounded in *Exxon Chemical* (*supra*) where the duty of the reviewing court is to conduct an objective examination of the facts placed before the Minister at the material time to ascertain whether a reasonable person, similarly circumstanced would have arrived at the same decision as the Minister had acted based on the facts. In fact the same approach was advocated in *Hong Leong Equipment Sdn Bhd* (*supra*) at pp. 513E-519B where His Lordship Gopal Sri Ram JCA at p. 519B opined:

> To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is *the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister*. If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of *certiorari*. (emphasis added).

[36] Coupled with the aforesaid duty, the court also has to bear in mind the principles elucidated in *Kathiravelu Ganesan* (*supra*) when at the referral level the Minister must adhere to the 'Hashim Yeop test' alluded to in para. 20 above. I am of the view that the "if he thinks fit" standard under s. 20(3) IRA premised on the "Hashim Yeop test" is well established; hence I agreed with the 3rd respondent that the applicant's reliance on other sections in the IRA referred to in para. 30 above is a departure from the issue at hand and I do not find it relevant to consider them.

[37] Reverting to the pertinent issue before the court, what then are the facts placed before the Minister at the material time? For the purpose of this exercise the relevant affidavits are the - (i) affidavit in support affirmed on 12 February 2007 by Dato' Dr Jacob Thomas (encl. 3), (ii) 3rd respondent's affidavit in reply affirmed on 4 April 2007 (encls. 12, 12A and 12B), (iii) 1st respondent's affidavit in reply affirmed on 17 September 2007 by Datuk Seri Dr Fong Chan Onn (enc1. 40), (iv) applicant's affidavit in reply (3) affirmed on 17 October 2007 (encl. 57), (v) 3rd respondent's affidavit in reply (4) affirmed by the 3rd respondent on 23 October 2007 (encl. 59), (vi) 1st respondent's affidavit in reply (2) affirmed on 5 December 2007 (enc1. 71B), (vii) applicant's affidavit in reply (4) affirmed on 7 December 2007 (encl. 71A).

[38] Having perused the various affidavits I accepted what is referred to in paras. 6.6 to 6.8 at pp. 87-91 of the 3rd respondent's submission (encl. 99) which is reproduced below:

(a) he has been provided with all information obtained from the reconciliation process and having studied and scrutinized the information he is satisfied that the 3rd Respondent's representation for reinstatement is fit for a reference to the Industrial Court - see para 8 of Enc1. 40;

(b) he has considered all information - see para 8 of Enc1. 40;

(c) his decision to refer was premised upon the information obtained from the reconciliation process - see para 11 of Enc1. 40; and

(d) he has considered the submissions made by the Applicant and the 3rd Respondent - see para 13 of Enc1. 40.

In Encl. 94, the 1st Respondent further confirmed in paras. 7 and 8 that he has considered the points raised by the Applicant regarding income tax and Employees' Provident Fund.

In short, the 1st Respondent has averred under oath that he has taken into consideration the information provided by the Applicant and the 3rd Respondent *vide* the reconciliation process.

6.7 In Encl. 40, the 1st Respondent also correctly recognized that it was the 3rd Respondent who lodged the representation for reinstatement - see paras 5 and 7, and that the reconciliation process took place on 22.8.2005 and both the Applicant and the 3rd Respondent attended the same - see para 6.

6.8 The 1st Respondent also revealed his reasons for the decision to refer. Having taken into account the information and considered the nature of the Applicant's case and the 3rd Respondent's representation for reinstatement, the 1st Respondent's reasons are as follows:

(a) only the Industrial Court has the jurisdiction to hear and determine the issue of whether the 3rd Respondent is a workman - see para 12 of Enc1. 40;

(b) the line between a contract of service and contract for service is very fine and hard to determine, and the responsibility, function and conduct of both parties have to be considered - see para 14 of Enc1.40;

(c) the issue of workman is a mixed question of fact and law and it is within the jurisdiction of the Industrial Court to determine and not the 1st Respondent - see para 15 of Enc1. 40;

(d) the Industrial Court is the forum with the jurisdiction to determine the status of the 3rd Respondent - see para 16 of Enc1.40;

(e) there is a serious conflict of fact which only the Industrial Court has the jurisdiction to determine the dispute and make a decision - see para 19 of Enc1.40 and para 6.4 of Enc1. 71B; and

(f) the 1st Respondent has considered all facts and given due consideration, and he has acted within the Industrial Relations Act 1967 in making the decision to refer and the decision was not unreasonable - see para 21 of Enc1.40.

From Enc1. 40, it is also beyond doubt that the 1st Respondent is aware of the nature of the 3rd Respondent's representation for reinstatement and the Applicant's opposition thereto. In para. 10 of Enc1. 40, the 1st Respondent described the agreements and summed up that the Applicant decided not to renew the 3rd Respondent's agreement.

In para 11 of Enc1. 40, the 1st Respondent recognised that it is the Applicant's stand that the relationship was not on the basis on "master and servant" or employer-employee and that the 3rd Respondent is not a workman. In para. 19 of Enc1. 40, the Minister referred to the Applicant's factual averments in paragraph 4[(iii)(a), (b), (c), (d), (e) and (f) of Encl.3. Specifically in reply to the factors raised by the Applicant in paras 4(iii)(a), (b), (c), (d), (e) and (f) of Enc1. 3, the Minister had stated in para 19 of Enc1. 40 that]

> Saya membuat keputusan berdasarkan maklumat yang diperolehi semasa rundingan damai. Pemohon dan Doktor tersebut telah membuat penghujahan masing-masing [(rujuk ekshibit "SJMC-6" Afidavit Pemohon). Melihat kepada penghujahan-penghujahan oleh kedua-dua pihak, saya dapati wujud percanggahan fakta yang serius yang hanya Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar pertikaian dan membuat keputusan.]

[This means] that he has not determined the status of the 3rd Respondent. The 1st Respondent in paras 4 and 8 of the Affidavit in Reply affirmed on 5.12.2007 (Enc1. 71B) reiterated that the factors put forth by the Applicant has been considered. Indeed, the Applicant's version has been taken into account.

The 1st Respondent also noted in para 14 of Enc1. 40 that in determining this issue, the "degree of control" exercised by the Applicant over the 3rd Respondent and the agreement has to be interpreted and determined.

In para 16 of Enc1. 40, the 1st Respondent said he has taken into account the question of control which could possibly result in the 3rd Respondent being deemed a workman - "yang memungkinkan beliau dianggap sebagai 'workman'".

> At the end, it is for the Industrial Court to decide this issue as stated by the 1st Respondent in para 12 of Encl. 40 wherein the 1st Respondent averred that "Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar dan memutuskan isu ini". [See *Kathiravelu Ganesan* (*supra*)] ... [T]he proceedings at the Industrial Court is an avenue for the Applicant to present evidence to establish its assertion that the 3rd Respondent is not a workman. ...
>
> The Industrial Court having "the jurisdiction to decide whether there is jurisdiction" is empowered to decide on the question of workman, a mixed question of fact and law. It "is solely for the Industrial Court to decide and that the learned judge was wrong in issuing *certiorari* to quash the decision of the Minister and in issuing the order of prohibition" and "the only legal forum to deal with this issue is the Industrial Court" [See *John Hancock* (*supra*)] ... at para [24] at p. 384 and at paras. [35] and [36] at p. 390. This Honourable Court would have "erred in law in holding that the claimant was not a workman as that would be tantamount to usurping the power of the Industrial Court".
>
> In this regard, the 1st Respondent again correctly recognised this position of the law as stated in para 12 of Enc1. 40 of the Affidavit in Reply affirmed on 5.12.2007 (Enc1. 71B) para 9, 10, 12 ...
>
> [T]he 1st Respondent has not decided the issue of whether the 3rd Respondent is a workman. This is clearly acknowledged by the 1st Respondent in his Affidavit (Enc1. 40). In para 15, the 1st Respondent said that it is for the Industrial Court and not him to determine this issue. In para 19, the 1st Respondent expressly said that he has not "mengiktiraf status doktor tersebut sebagai workman" and it is for the Industrial Court to decide that issue.

[39] As to the claim of inadequate weightage given to the factors raised by the applicant etc., I find there is no merit whatsoever after having perused the affidavits. The reason being on the serious issue of fact and law which requires to be determined involves the status of the workman and which concerns the relationship between the applicant and the 3rd respondent, I find the Minister has considered the relevant factors as affirmed in para. 14 of enc1. 40:

> Kewujudan unsur-unsur kawalan ini menimbulkan keraguan kepada dakwaan Pemohon yang status Doktor tersebut ialah seorang 'independent contractor'.

[40] With regard to the question of illegality, I agreed with the 3rd respondent's submission that it is a legal issue and a legal issue is not for the Minister to decide; rather it is for the Industrial Court "a judicial body created by the Act to decide on the legal issue such as this" as held by the Court of Appeal in *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2004] 1 CLJ 451 in the

majority decision at p. 461 which held that whether an estoppel operates in industrial cases of representation to the Industrial Court is a legal issue and is not an issue for the Minister to make a decision being an administrative body. Further support is found in the persuasive authority of *Mervin Phelan v. BIC (Ireland) Ltd, Biro BIC Ltd, Societe BIC SA and Robert McDonald* [1997] ELR 208 at p. 211 that "the effect of illegality is to be tried by the Court" *albeit* the case concerns an application for an interlocutory injunction by the plaintiff arising out of the termination of office of the managing director of the first named defendant company which appointed the plaintiff.

[41] Further, on the issue of illegality as submitted by the 3rd respondent, it does not oust the jurisdiction of the Industrial Court to hear a case; rather it concerns only with enforceability whereby "It cannot be enforced at the suit of anyone who was knowingly a party to the illegality ... The [court or tribunal] must hear the case and come to a conclusion." In addition, "[The court or tribunal] can only come to a conclusion, one way or the other, on evidence. If the evidence is insufficient to establish illegality, or the requisite knowledge of illegality, then no such finding is made." I find support in the case of *Wilkinson v. Lugg* [1990] ICR 599 where the Employment Appeal Tribunal dismissed the employee's appeal on the grounds that the decision was perverse and that the industrial tribunal had erred in law in failing to reach a decision on the illegality of the contract since it affected their jurisdiction to hear the complaint.

[42] Thus I agreed with the 3rd respondent that it is rather premature for the applicant to say that at this judicial review stage that the reference of the 3rd respondent's representation could bring about an illegality. In the light of this, I do not consider it necessary at this juncture to dwell on the issue of whether there is any illegality with respect to the contract entered between the 3rd respondent and the applicant as it is yet to be tested and it is within the purview of the Industrial Court to determine on the evidence.

[43] Based on the reasons given the court concluded that the Minister has not erred in law or exceeded his jurisdiction on any of the grounds as contended by the applicant when exercising his discretion under s. 20(3) IRA to refer the applicant's representation for adjudication by the Industrial Court. Hence the order of the court, *inter alia*, dismissing the applicant's application for an order of *certiorari* to quash the Minister's decision to refer the applicant's representation to the Industrial Court referred to in para. 1 above.